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IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 12,278

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor,

v.

KENNETH E. RENNEKAMP, individually and doing
business as Radio Station W E M R,
Appellant.

BRIEF FOR APPELLANT AND APPENDIX

APPEAL FROM DECREE OF UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
AT CIVIL ACTION FILE No. 14,758

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INDEX TO BRIEF.

	PAGE
Statement of Questions Involved	1
Statement of the Case	2
Argument for Appellant	4
1. Were the defendant and his employees subject to the provisions of the Fair Labor Standards Act?	4
2. To construe the Fair Labor Standards Act as applicable to the defendant would result in violation of his constitutional rights under the Fifth Amendment to the Constitution of the United States	11
3. The Findings of Fact and Conclusions of Law are not sustained by the evidence	15
4. In view of the circumstances, the action was moot and there was no substantial need for an injunction	28
Conclusion	33

TABLE OF CITATIONS.

CASES.

Bolling *et al.* v. Sharpe *et al.*, 347 U. S. 497 (1954)	14
Brooklyn Bank v. O'Neil, 324 U. S. 697 (1945)	6
Hecht Company v. Bowles, 321 U. S. 321 (1944)	31
Lorain Journal Company v. United States, 342 U. S. 143	5, 6, 7, 8, 9, 11, 12
Mabee v. White Plains Publishing Company, 327 U. S. 178 (1946)	10
Mitchell v. Joyce Agency, C. A. 7, 211 F. 2d 241 (1954)	5
Mitchell v. Raines, D. C. Ga., 136 F. Supp. 5 (1955)	5

PAGE

Sun Publishing Company v. Walling, 140 F. 2d 445 (1944), C. A. 6 ..... 11, 13
Walling v. Associated Truck Lines Inc. (D. C.—Mich.) 57 F. Supp. 943 32
Walling v. Gulf States Paper Corp. (C. C. A.—5) 143 F. 2d 301, affirming 53 F. Supp. 619 32
Walling v. Halliburton Oil Wells Company (D. C. Cal.) 57 F. Supp. 408, affirmed 152 F. 2nd 622, affirmed 331 U. S. 17, 91 L. Ed. 1313, 67 S. Ct. 1056 32
Walling v. Jacksonville Paper Company, 317 U. S. 564 (1943) 10
Walling v. Panther Creek Mines Inc. (C. C. A.—7) 148 F. 2nd 604 32

STATUTES.

Constitution of the United States:
Fifth Amendment 1, 11, 12, 13, 14, 15, 33
Fourteenth Amendment 14
Emergency Price Control Act 31
Fair Labor Standards Act of 1938 as amended (29 U. S. C. A. § 201 *et seq.*; 52 Stat. 1060) .. 1, 2, 4, 5, 6, 8, 9, 10, 11, 13, 14, 15, 26, 27, 33
29 U. S. C. A., Sec. 213 8
subparagraph 2 8
subparagraph 8 9
Section 13 10
Subsection 8 11
Minimum Wage & Maximum Hours Provisions 15, 29, 30
Sherman Anti-Trust Law 7

REGULATION.

Regulations of the Wage & Hour Administrator, Section 516.1 ..... 15, 27

INDEX TO APPENDIX.

	Direct Exam.	Cross Exam.	Re-direct Exam.	Re-cross Exam	PAGE
Docket Entries					1a
Memorandum Decision on Motion for a New Trial					3a
Order					6a
Excerpts from Testimony					7a
Robert Curt Doelicke—Deposition	7a	8a			
	8a	9a			
Albert P. Burton	10a	11a	15a	15a	
George E. Dolnack, Jr.	16a	17a			
James Agnello	18a				
Objection to Testimony of Betty Lesco					19a
Norman W. Suiter	19a				
Discussion					20a
Kenneth E. Rennekamp	20a				
Statement by Mr. Weiner					21a
Remarks of the Court					21a
Kenneth E. Rennekamp	22a	23a			
Statement by the Court					24a
Letter from Defendant's Attorney to Plaintiff's Attorney, dated September 24, 1956					25a
Letter from Plaintiff's Attorney to Defendant's Attorney, dated October 10, 1956					27a

Statement of Questions Involved.

1. Were the defendant and his employees subject to the provisions of the Fair Labor Standards Act?

2. Does the application of the Act to defendant violate his constitutional rights under the Fifth Amendment to the Constitution of the United States by reason of unwarranted, arbitrary, and unreasonable discrimination as between the operator of the smallest licensed radio station and the publisher of the smallest classification of newspapers?

3. Are the Findings of Fact and Conclusions of Law sustained by the evidence?

4. Notwithstanding any evidence presented by plaintiff, was the action moot and was there any substantial need for an injunction under the special circumstances here present?

Statement of the Case.

This action was brought by the Secretary of Labor for an injunction to restrain the defendant from violating the Fair Labor Standards Act of 1938 as amended (29 U. S. C. A. § 201 *et seq.*; 52 Stat. 1060). The Complaint alleged that defendant employed "approximately four (4) employees in and about the said place of business in the operation of Radio Station W E M R, including broadcasting in interstate commerce" (Paragraph IV), and charged the defendant with violation of the minimum wage, overtime, and record-keeping provisions of the Act.

The Complaint alleged violations in the broadest of terms and the defendant filed a Motion for Bill of Particulars. At the argument thereon before Chief District Judge Gourley on August 5, 1956, the Court pointed out that such a Motion was no longer provided for under the District Court Rules but urged plaintiff's counsel to furnish the requested information in order to expedite the action. Plaintiff's counsel then stated before the Court that the Complaint was based upon alleged violations with respect to five employees whose names were then furnished to the defendant. This is confirmed by an exchange of correspondence between counsel (Appendix, 25a-27a incl.). The defendant thereafter filed his Answer denying that he was engaged in interstate commerce, that he was covered by the Act, or that he had committed any of the violations alleged by the plaintiff.

The action was tried before the Honorable Joseph P. Willson, District Judge, without a jury, on January 16, 17, and 18, 1957. At the trial the plaintiff did not produce all of the five witnesses whose testimony the defendant expected to meet in accordance with the information he had

previously received from plaintiff's counsel at the argument before Judge Gourley, but plaintiff introduced the testimony of two persons, Mr. Dolnack and Mrs. Lesco, not previously named by the plaintiff, and the testimony of these two was received in evidence by the trial judge over objections by defendant (Appendix, 16a-17a, 19a).

Immediately after the taking of testimony was completed, the trial judge indicated from the bench that the injunction sought by the plaintiff would be granted, his reasons for the action, and directed plaintiff's counsel to submit Findings of Fact and Conclusions of Law (Transcript, pages 249 to 256 incl.). On January 25, 1957 Findings of Fact and Conclusions of Law were filed by the Court and an Injunction order was entered (Appendix, pages 6a-7a incl.).

On February 4, 1957 defendant filed Motion for New Trial; argument thereon was heard by Judge Willson on March 11; and on March 12, 1957 the Court filed a Memorandum Decision denying the Motion for New Trial (Appendix, 3a-5a incl.). This appeal followed.

The undisputed facts are that Radio Station W E M R had a power of only 100 Watts under license from the Federal Communications Commission (Third Finding of Fact); that its radius was 10 miles in any given direction (Appendix 20a); that the distance from Emporium, Pa., the location of Station W E M R, to the nearest state line was 51 miles (Transcript, page 221); that the routine operation of the Station, aside from occasional remote pickups, required only one man (Appendix, top of 9a, bottom 11a); that on October 20, 1956 the Radio Station was dismantled (Ninth Finding of Fact); that defendant surrendered his license for cancellation to the Federal Com-

munications Commission, and said license was cancelled by that government agency as shown by their letter of December 14, 1956 (Appendix, 22a).

In addition to the Questions of Law Involved in the case and to be dealt with in the argument for appellant, the credibility of the witnesses upon whom plaintiff relied is of primary importance and will be strongly argued by defendant, whose position is that even a cursory examination of the testimony will disclose it to be unworthy of belief; that the lower Court failed to weigh the testimony and reached a conclusion not warranted under the evidence presented.

ARGUMENT FOR APPELLANT.

1. Were the defendant and his employees subject to the provisions of the Fair Labor Standards Act?

The coverage of the Act with respect to the defendant and his employees turns on the extent to which they were in, or a part of, interstate commerce. There is no dispute that Radio Station W E M R operated with power of only 100 Watts (Third Finding of Fact). Furthermore, Rennekamp testified without contradiction (Transcript, page 152) that it is the smallest size station licensed by the Federal Communications Commission and that its radius was limited to 10 miles in any given direction (Transcript, page 218). The Court accepted this as a fact: "Mr. Levin: It will show this is a small station with a radius of 10 miles officially in either direction. The Court: I do not see any dispute about that." (Appendix, 20a). At page

221 of the Transcript the Court indicated that the distance from Emporium to the nearest state line is about 51 miles.

Paragraphs 4 and 5 of the Complaint alleged that the defendant's radio station was engaged in broadcasting in interstate commerce and that the employees were employed in interstate commerce. It is highly doubtful whether a station with a power of only 100 Watts and a radius of 10 miles, located at a distance of 51 miles from the nearest state line, is engaged in or plays any substantial part in interstate commerce. Counsel has been unable to find a single case wherein the applicability of the Fair Labor Standards Act to small radio stations was raised, contested, or directly in question.

The burden of proving that the defendant was engaged in interstate commerce was upon the plaintiff: Mitchell v. Joyce Agency, C. A. 7, 211 F. 2d, 241 (1954) and Mitchell v. Raines, D. C. Ga. 136 F. Supp. 5 (1955).

The facts referred to above do not support the plaintiff's position. However, plaintiff attempted to establish that the defendant and his employees were subject to the Fair Labor Standards Act by reason of the utilization of the Associated Press tickers, periodic news broadcasts, and the re-broadcast of occasional football games and a few baseball games which originated outside the state.

In its opinion denying defendant's motion for a new trial, the Court cites the case of Lorain Journal Company v. United States, 342 U. S. 143, as authority for the proposition that the defendant here was engaged in interstate commerce, quoting from that opinion the following: "There can be little doubt today that the immediate dissemination of news gathered from throughout the nation or the world

by agencies specially organized for that purpose is a part of interstate commerce * * *" (Appendix, 4a) and the Court asserts that the defendant's radio station "had in its office an Associated Press teletype machine, which was in operation on a 24-hour basis." None of the testimony indicates that Radio Station W E M R was operated on a 24-hour basis; all of the testimony is to the contrary.

The lower Court, in denying a new trial, further cites the fact that in addition to the disseminating of world-wide news, the station carried broadcast of baseball games which originated from outside Pennsylvania. The evidence in this connection is to be found solely in a deposition of Robert Curt Doelicke, at page 22, where he states that there were some Pittsburgh Steeler football games re-broadcast "through a pick-up" from outside the state and that at the end of the baseball season there were a few baseball games which were picked up, presumably on re-broadcast, but which originated outside the state. Nevertheless in the year round operations of a small local radio station, such re-broadcast of a few games from outside the state could hardly be construed as being a substantial part of interstate commerce.

The Lorain Journal case dealt with an entirely differeat situation from that which prevailed here and involved an entirely different Federal statute. The application of the interstate commerce yardstick in that case and under a different Act should not necessarily prevail under the present state of facts. In Brooklyn Bank v. O'Neil, 324 U. S. 697 (1945), a case arising under the Fair Labor Standards Act, the Supreme Court per Mr. Justice Reed, at page 713, states: "* * * The decision in the instant case is based on the legislative policy behind its enactment and issues aris-

ing under other acts having different legislative backgrounds are not conclusive in determining the legislative intent with respect to the Fair Labor Standards Act.* * *"

The owners of the Lorain Journal held a monopoly upon advertising in the City of Lorain, Ohio until such time as a new radio station was licensed by the Federal Government and began to compete with the Journal for advertising. In an effort to eliminate or hamper this competition, the owners of the Journal refused to accept advertising from those concerns which patronized the competing radio station. The Complaint in that case alleged, *inter alia*, that the defendants were engaged in a combination and conspiracy in restraint of interstate commerce. The opinion of Mr. Justice Burton indicates that the Lorain Journal had a circulation of over 13,000 copies. In a footnote at page 147, it was indicated that the competing Radio Station W E O L operated under power of half millivolt during the daytime and two millivolt at night; that its daytime pattern reached an area containing all or part of 20 counties and an estimated population of about 450,000. (An industry publication lists the power of Station W E O L as 1000 Watts or 10 times the power of W E M R).

In holding that both the Lorain Journal and Radio Station W E O L were in interstate commerce, the Court, first of all, was seeking to give to the Radio Station the protection of a Federal statute, to-wit, the Sherman Anti-Trust Law; and, secondly, the disparity of the coverage between the radio station in that case involving all or part of 20 counties and the limited coverage of 10 miles for Station W E M R is so great as to justify distinguishing the ruling in the Lorain case and excluding its application from the present facts involving W E M R.

A further distinguishing basis may be found in the following quotation from the Lorain opinion at page 152: "The distribution within Lorain of the news and advertisements transmitted to Lorain in interstate commerce for the sole purpose of immediate and *profitable* reproduction and distribution to the reading public is an inseparable part of the flow of the interstate commerce. * * *" (Emphasis supplied.) We have emphasized the word "profitable" for the reason that it distinguishes one phase of the operations of the Lorain Journal from the facts with respect to W E M R in this case. Lorain Journal, upon receiving news transmission, incorporated the news with advertising into its newspapers and *sold* such newspapers for *profit*. On the other hand, any dissemination of news on the part of the defendant through Radio Station W E M R was entirely free to the listening public within its 10-mile radius and constituted no more than a public service on the part of the defendant.

Only if a news broadcast were sponsored would any profit accrue to defendant, the sole source of revenue of Station W E M R being from advertising, primarily local, whereas a newspaper receives income not only from advertising but from the *sale* of newspapers to its readers.

It requires no extended argument that out-of-state advertisers have little occasion or use for a local station with a 10-mile radius when they can blanket the area by advertising upon the more powerful regional radio stations.

The absence from the Act of any specific reference to the radio broadcasting industry and the exemptions from the coverage of the Act expressly provided in Section 13 thereof (29 U. S. C. A., Sec. 213) are significant. Among the exemptions are subparagraph 2 which

relates to any employee employed by a retail or *service* establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the state in which the establishment is located; subparagraph 11, which exempts any switchboard operator employed in a public telephone exchange which has not more than 750 stations; and subparagraph 8, which exempts from coverage of the Act "any employee employed in connection with the publication of any weekly, semi-weekly, or daily newspaper with a circulation of less than 4000 the major part of which circulation is within the county where printed or published, or counties contiguous thereto * * *"

This last exemption in the Act of employees of small local newspapers obviously limits the applicability of the Lorain Journal decision so as to bar the application of that decision to the small newspapers of the type specified. If Congress recognized a basis for distinction under the Fair Labor Standards Act between larger newspapers such as the Lorain Journal and smaller ones such as those specified in Subparagraph 8, and this distinction was accepted as reasonable in the Lorain Journal case, then logically the declaration of the Supreme Court in the Lorain Journal case that Station W E O L was engaged in interstate commerce should likewise be limited to the larger radio stations and not applied to the very smallest type of radio station such as W E M R which, in radio broadcasting, is to the large stations what the exempted small newspapers are to the larger newspapers.

That Congress intended to exempt from the provisions of the Fair Labor Standards Act business activities which are primarily local in character is clear from the nature of

the exemptions set forth in Section 13 of the Act. This conclusion is further supported by the opinion of the Supreme Court in the case of Walling v. Jacksonville Paper Company, 317 U. S. 564 (1943), a case also arising under the Fair Labor Standards Act, wherein Mr. Justice Douglas, speaking for the Court, states at page 570: "* * * In this connection we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states * * *"

The same view is reiterated by the Supreme Court in Mabee v. White Plains Publishing Company, 327 U. S. 178 (1946) where Mr. Justice Douglas, speaking for the Court and referring to the exemption of small weekly newspapers from coverage under the Fair Labor Standards Act, states at page 184: "* * * and the exemption of small weeklies and semi-weeklies is not a 'deliberate and calculated device' to penalize a certain group of newspapers * * *. As we have seen, it was inserted to put those papers more on a parity with other small town enterprises". In view of the absence from the Act of any specific reference to radio stations, and if radio stations are held to be covered upon the same basis as newspapers, i.e. receipt of news from the news services and dissemination of such news, the exemption provided in the Act for small local newspapers must be applied to the smallest local radio stations, which are in all respects on the same footing. This point will be further elaborated under the next heading.

In summary, defendant respectfully submits that the plaintiff failed to meet its burden of establishing that the operation of Station W E M R by the defendant and his three or four employees within a 10-mile radius of Em-

porium, Pa. was within the coverage of the Fair Labor Standards Act; and further, that the doctrine of the Lorain Journal case is not applicable to the instant case.

2. To construe the Fair Labor Standards Act as applicable to the defendant would result in violation of his constitutional rights under the Fifth Amendment to the Constitution of the United States.

When Congress exempted from the coverage of the Fair Labor Standards Act, "any employee employed in connection with the publication of any weekly, semi-weekly, or daily newspaper with a circulation of less than 4000 the major part of which circulation is within the county where printed or published or contiguous thereto * * *" (subsection 8 of Section 13, 29 U. S. C. A., sec. 213), it set up as a basis for distinction with respect to interstate commerce the differences between newspapers generally and small newspapers purely local in scope. If it was within the power of Congress to make such a distinction, and the Courts have so held in numerous cases (as in Sun Publishing Company v. Walling, 140 F. 2d 445) it is respectfully submitted that a similar distinction must be drawn between a purely local radio station such as W E M R, with a coverage limited to a 10-mile radius and power of 100 Watts, and larger stations with substantially wider reach and influence; and that, even if such larger radio stations are held to be in interstate commerce, the smallest type radio station, nevertheless, must be excluded from coverage of the Act.

This follows from a consideration of the relative positions of the small local newspapers expressly exempted in

the Act from its coverage and the smallest type of local radio station. Both are media of communication and it could only be on that basis that any question of coverage could arise in this instance. Both types of business are comparable from the aspects of limited number of employees, limited number of readers or listeners, limited area of coverage, limited effectiveness from an advertiser's viewpoint, limited gross income and, in fact, they compete among themselves for advertising to the same extent as small weekly, semi-weekly, or daily newspapers would compete among themselves. In view of these realities, there would appear to be no valid legal basis for treating the smallest type of radio station differently from small weekly, semi-weekly, or daily newspapers specifically exempted from coverage, especially since the Court in the Lorain Journal appears to bracket newspapers and radio stations together by reason of their utilization of news services.

The Fifth Amendment to the Constitution of the United States guarantees that "No person shall be deprived of life, liberty or property, without due process of law * * *" The action of the lower Court in holding that the defendant and Radio Station W E M R were covered by the Act deprives the defendant of his property right in the operation and utilization of the said radio station and deprives him of the incidents of property ownership. Furthermore, if, under the injunction issued in this case, the defendant were subsequently to be charged with contempt of Court for violation of the injunction, any punishment imposed could well constitute a deprivation of his liberty without due process of law.

The effect of the decision of the lower Court in this case is to hold that the exemption of small weekly, semi-weekly, and daily newspapers from coverage of the Act does not extend to small local radio stations. Such an interpretation is not really necessary or justified in view of the realities and the similarities hereinabove pointed out. However, if the decision of the lower Court in applying the Act to the defendant may be considered as a proper interpretation of the intent of the Congress, the defendant must question the constitutionality of the Act as it applies to him in this instance.

Even the case of Sun Publishing Company v. Walling, 140 F. 2nd 445 (1944), C. A. 6, relied on by the plaintiff and which held, as between the larger newspapers and the small ones, at page 448, that the classification was not improper and does not violate the Fifth Amendment by classifying newspapers in respect to frequency of issue and size of circulation, attached a condition that this would be true only so long as the classification appears *reasonable*. If the test of reasonableness is applied to the situation of the defendant and his small radio station, it is a logical conclusion under the circumstances that he is entitled to the same exemption from coverage as the small weekly, semi-weekly, or daily newspaper with which he would be in competition and in comparable position.

To deny him that exemption from coverage would constitute an unwarranted, arbitrary, and unreasonable discrimination as between him and the smaller classification of newspapers: and if it be said that Congress so intended in enacting the Fair Labor Standards Act, the Act must be construed as unconstitutional in this instance. But, since it is the duty of the Courts to interpret legislative enactments in

such a manner, as far as possible, as to uphold their constitutionality, it is possible and logical for this Court to rule that Congress intended to do that which was not violative of the constitutional rights of any individual and what was reasonable and logical; that, therefore, in exempting small weekly, semi-weekly, and daily newspapers from the coverage of the Act, Congress intended to exempt businesses falling within the same general classification, scope and significance, such as the smallest type of radio stations.

In the absence of any valid basis for distinction between the smallest type of local radio station and the smallest newspapers, the application of the Act to the defendant in this instance, as operator of a small local radio station, constitutes an unwarranted, unreasonable, and injurious discrimination against him and others similarly situated. It is true that the Fifth Amendment differs from the Fourteenth Amendment in that the former does not contain a clause guaranteeing to an individual the equal protection of the law but, on this score, defendant respectfully commends to the consideration of this Court the statement of Mr. Chief Justice Warren in the case of Bolling *et al.* v. Sharpe *et al.*, 347 U. S. 497 (1954), relating to the Fifth Amendment and involving segregation in the schools of the District of Columbia. At page 499 the chief justice, speaking for the Court, holds as follows: "• • • The Fifth Amendment which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideals of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due

process of law', and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable is to be violative of due process of law * * *"

The application of the Fair Labor Standards Act to defendant under the circumstances of this case constitutes a discrimination so unjustifiable as to violate the due process of law guaranteed to him under the Fifth Amendment.

3. The Findings of Fact and Conclusions of Law are not sustained by the evidence.

This phase of the argument will be discussed in two parts: first, with reference to the allegations of violation of the Minimum Wage & Maximum Hours provisions of the Fair Labor Standards Act; and, secondly, with respect to the alleged violations of the record-keeping provisions of the Act and of the Regulations promulgated by the Wage & Hours Administration under the Secretary of Labor.

The granting of an injunction in this case is a travesty of justice and due process of law. The lower Court reached its decision immediately after the taking of testimony was completed, without taking time to evaluate the evidence, in spite of specific circumstances pointed out by defendant's counsel as casting grave doubts upon the merits of the plaintiff's case.

The trial judge reiterated several times that the injunction was justified by the "credible" testimony produced by the plaintiff, but even a cursory examination of the testimony will disclose that the Court was led astray and that the Findings of Fact and Conclusions of Law are based

upon testimony so contradictory, inconsistent, irresponsible, and palpably false as to destroy the case made by the plaintiff and to negative the credibility of plaintiff's witnesses.

In its Memorandum Decision refusing a new trial the lower Court states (Appendix, 5a) "In order to pay its way the employees were required to sell advertising * * *." In the Fifth Finding of Fact, the Court finds that "defendant employed numerous employees * * *" and "that these employees * * * performed such duties as * * * sale of advertising for defendant's radio station." With respect to the use by the Court of the word "numerous", paragraph IV of the Complaint alleged that "defendant employed and is employing approximately four (4) employees * * *." Furthermore, plaintiff's own witnesses conceded that, except for special events broadcast from outside the studio in a relatively few instances, Station W E M R could be operated and kept on the air by one man, a combination announcer-engineer (Appendix, 9a and 11a).

As to the number of employees who engaged in selling advertising, the Fifth Finding of Fact is completely nullified by the testimony of plaintiff's main witness, Robert Curt Doelicke, who testified by deposition. He was the manager during the greater period of time involved in this proceeding and claimed to have spent substantial periods of uncompensated time in selling advertising. On the matter of other employees selling advertising, he testified on direct examination "but they never did sell any * * *" (Appendix, 7a).

Although another witness, Agnello, testified as part of the plaintiff's case that he made some attempt at selling

advertising during a period after Doelicke's employment had terminated, he (Agnello) stated, and plaintiff conceded, he was paid for the time involved from February to October 1956 (Transcript, middle page 96), notwithstanding that his testimony is unclear with respect to a limited period before February 1956.

The lower Court further states in the Memorandum Decision "The defendant's testimony and his other evidence simply did not overcome the credible testimony offered by the employees on behalf of the government * * *" (Appendix, 5a). Let us, therefore, examine the "credible" testimony which so impressed the lower Court.

Plaintiff's case is built mainly on the testimony of Robert Curt Doelicke and Albert P. Burton. Doelicke was announcer-manager of Station W E M R for a substantial period of time and alleged that, although he was paid for forty-eight hours every week, he worked as much as twelve hours extra each and every week selling advertising for the Station and was not paid for the selling time. Doelicke testified unequivocally that the time he allegedly spent in selling was in the *afternoons*, five days a week (Appendix, 7a to 8a) yet Burton, the other main witness for the plaintiff, testified that Doelicke did his selling in the *mornings*, after a short stop at the Station at about 9:00 A. M. (Appendix, 15a-16a).

Doelicke and Burton contradict each other in another phase of their testimony. Doelicke, in one of his answers makes quite a point of a lack of transportation to get to and from the Station and refers to the "time consuming effort" to get back and forth (Appendix, 8a). Nowhere in his testimony does Doelicke ever indicate that Burton was

providing him with transportation yet Burton testified in detail that he allegedly drove Doelicke "almost continually" for "possibly three months" (Appendix, 12a).

Another illuminating but unbelievable bit of testimony from Burton, relating to the time allegedly spent by him driving Doelicke about, appears in the Appendix at 12a, where Burton testifies that not only did Doelicke require the witness to drive him around, but led him to believe that his compensation for the driving would be his standard rate as engineer-announcer. Further, Burton testified that even though he was never paid for the time allegedly spent in transporting Doelicke, he never made any complaint to Rennekamp about it (Appendix, top and bottom 14a).

But, in addition to the foregoing discrepancies in the testimony of plaintiff's two main witnesses, Burton deliberately and openly *lied*, without affecting his position as a "credible" witness in the eyes of the trial judge. Burton's lies were not with respect to a minor matter but went to the very heart of the case, to-wit, whether the defendant required his employees to work hours in excess of the maximum at less than the applicable hourly minimum rates, or without compensation.

On direct examination, after testifying that he was paid at the correct rate for his scheduled forty-five hours per week, Burton testified that he worked hours in excess of forty-five doing remote broadcasts (Appendix, 10a). He testified also in that connection that he did request record shows three nights a week, at first from 9:00 to 10:00 P. M., and, later, from 9:00 to 11:00 P. M., in addition to his regular work schedule; that these request shows began in December 1954 and ran for three or four months; that

these hours were not shown on time sheets submitted to Mr. Rennekamp, and that he was not paid overtime for these request shows (Appendix, 10a-11a).

On cross examination, Burton identified Exhibit No. 1 as fifteen pages of time sheets made out by him and on which he received payment. He was then shown the time sheets for the period from December 1954 to February 19, 1955 and *admitted being paid for the record shows he did during that period* (Appendix, 13a-14a).

That admission also applies to the remote broadcasts which Burton claimed he took part in. On page 19 of the Transcript he refers to a remote broadcast which originated at the Sons of Italy hall on Saturday nights and a remote broadcast on one occasion from the Knights of Columbus, also on a Saturday night. At page 42 of the Transcript, on cross examination, he was asked about these special broadcasts on Saturday nights and whether they were included in the period from 6:30 to 11:15 and he answered in the affirmative. According to the testimony of plaintiff's own employee, Suiter, at page 129 of the Transcript, Burton was employed at Station W E M R between November 1954 and May of 1955. At page 21 of the Transcript there is an indication that Burton began these special broadcasts in the beginning of his employment where he refers to a high school football game on the first day he worked at the Station. He was then asked about the request shows and indicated that he worked in those three nights a week and that in relation to the commencement of his employment by the defendant, the request shows began about six weeks afterwards. A reference to the time sheets introduced into evidence as Exhibit No. 1 will show that Burton was paid for Saturday evenings involved in the special or remote broadcasts.

Burton was asked whether he had read a provision on the back of the time sheets upon which he and the other employees reported their hours worked and which indicated that written approval must be obtained from the station manager before the employee would be authorized to work hours different from the schedule. His answer was that he had read the provision, that he never had received written approval for overtime from Doelicke, that "everything was verbal" (Appendix, 14a).

Another witness for the plaintiff was George E. Dolnack Jr. who was employed during the period from November 1954 to May 1955 as a combination man, engineer-announcer (Transcript, page 50). His testimony was objected to for the reason that his name was not listed by the plaintiff among the names which plaintiff's counsel submitted to defendant at a hearing before Chief District Judge Gourley on August 5, 1956 in connection with defendant's Motion for Bill of Particulars. The Court overruled the objection and admitted his testimony (Appendix, 16a-17a). Further comment on this action of the Court will be made at a later point in this argument.

On page 53 of the Transcript Dolnack testified that he assisted in the remote broadcasts referred to by Burton and alternated evenings with Burton on the request record shows. It is submitted that the time sheets upon which Dolnack was paid and which are in evidence as Defendant's Exhibit No. 2 will indicate that Dolnack also was paid for the remote broadcasts and the request record shows for which he claimed he had not been compensated.

In the Seventh Finding of Fact the lower Court found that employees "frequently and repeatedly worked longer

hours each work week than those specified by Section 7 of the Act and *never* received excess additional compensation for such excess hours" (emphasis added). Aside from the question of credibility of plaintiff's witnesses as it affects the Seventh and other Findings of Fact generally, the use of the word "never" is controverted by plaintiff's own witnesses. Doelicke testified that on one occasion he was paid $10.00 extra (Appendix, 8a-9a). Dolnack testified that on one occasion he submitted overtime on his time sheet and was paid for it (Appendix, 17a). Norman W. Suiter, an investigator for the Wage and Hour Division of the U. S. Department of Labor, testifying for the plaintiff, indicated on direct examination that on a particular occasion in connection with a football game overtime was paid for six extra hours (Appendix, 19a).

Reference to Mr. Suiter brings up a matter in connection with a part of his testimony and the testimony of George E. Dolnack Jr. and Betty Lesco involving rulings by the Court. In the matter of Suiter, he was permitted, over objection by defendant, to testify as to transcript of certain logs. In rebuttal, on direct examination, he was not asked who made the transcripts but, in view of his testimony in plaintiff's case in chief that he made certain transcriptions, it was fair to assume that his rebuttal testimony related to his own transcriptions. On cross examination it became immediately apparent that the transcriptions were not made by him or in his presence, and that he could not vouch for their accuracy. The Court overruled objections and admitted them in evidence (Transcript, pages 246 to 249). Defendant submits that the Court erred in its ruling.

After the Complaint was filed in this action, setting forth the customary general allegations, defendant filed a

Motion for a Bill of Particulars. This came before Chief District Judge Gourley on August 5, 1956. The matter has already been referred to in the Statement of the Case, *supra*. At that time, at Judge Gourley's urging, counsel for the plaintiff supplied the information desired by the defendant and set forth the names of five employees upon whose testimony plaintiff would rely at the trial of the case to establish the alleged violations. This occasion is confirmed by an exchange of correspondence between counsel for the parties as shown in the Appendix at 25a-27a.

The names of George E. Dolnack Jr. and Betty Lesco were not included in the list of five names furnished by plaintiff's counsel to the defendant on that occasion yet, at the trial, their testimony was offered in evidence and admitted over the objections of the defendant (Appendix, 16a-17a, 19a). These rulings were obviously prejudicial to the defendant since the defendant had no prior notice of their intended appearance and no opportunity to make the proper advance preparation to meet their testimony. In view of the ruling of the Court admitting the testimony of these witnesses, the defendant made such efforts as he could on the spur of the moment to cross examine and controvert the testimony but it can be readily appreciated that a defendant is handicapped under those conditions; and it is respectfully submitted that the lower Court erred in admitting the testimony of these two witnesses.

Returning to the matter of the "credibility" of plaintiff's witnesses and the weight to be given to their testimony, it is a striking fact that although practically all of plaintiff's witnesses claimed they were required to work extra hours without being compensated, each ad-

mitted that they had never made any complaint to or demand upon Rennekamp at any time regarding overtime except in the case of Doelicke (Appendix, 9a, top & bottom 14a, Transcript page 59). Doelicke claimed to have done so when his employment was about to terminate (after he had sought to buy the Station from Rennekamp and been refused) (From Doelicke's deposition, pages 109-110).

It is particularly significant that plaintiff's main witness, Doelicke, testified on direct examination in positive terms that he worked each and every week in excess of sixty hours but had no shred of any record and kept no tabulation of any kind. (Appendix, 9a, Doelicke's deposition, page 423).

It is on false, contradictory, improbable, obviously biased testimony such as related above that the lower Court pinned the label of credibility and justifies an injunction which is a blemish upon the record of a reputable business man and an honorable member of the bar.

The explanation for the circumstances which led to the present action is to be found in the testimony of Dolnack that he was told by Doelicke to make a time sheet out in a particular way to avoid questioning by Rennekamp as to the reason for two or more men being on duty at this one-man station at a particular time and to conceal from Rennekamp that there was overlapping going on (Appendix, 18a). This testimony makes it clear that Rennekamp was the victim of a conspiracy of concealment by a manager upon whom he had a right to rely and employees who owed him a duty of good faith. These indignities have been aided and abetted by an overzealous government

bureau, and all of them together have imposed upon the lower Court. It is respectfully submitted that the lower Court erred in reaching a hasty and unwarranted conclusion that plaintiff was entitled to an injunction against the defendant upon the evidence which was presented.

In reviewing the trial record, a serious question arises as to whether Doelicke's entire deposition was properly before the lower Court and whether a new trial is not required because of the procedure followed. The deposition was not read into the record at the trial but was offered in bulk (Transcript page 123). At the time the depositions were taken in New York City in advance of the trial, there were numerous objections entered of record on the part of the defendant and a motion made to strike out Doelicke's testimony entirely. These objections and the motion to strike were not ruled upon by the Court at the trial below (Transcript, p. 123) and have not been ruled upon by any judge to date. While defendant would prefer to have this case decided on the merits, the failure to rule on the objections and on the motion to strike certainly constitutes a serious defect in the proceedings.

At this point, it is appropriate to discuss the alleged violations of the record-keeping provisions of the Act and the Regulations promulgated thereunder. The Eighth Finding of Fact states that the defendant kept inaccurate records and that he instructed his employees directly or through the station manager to show a specified scheduled number of hours each week, etc. This Finding of Fact is completely nullified by the testimony in plaintiff's own case, previously referred to above, which was given by Dolnack and is quoted at page 18a of the Appendix indicating that the instructions allegedly given to Dolnack

by the manager, Doelicke, regarding the listing of hours worked, were for the deliberate purpose of concealing the facts from Rennekamp and the testimony discloses that the witness, Dolnack, joined in concealing the situation, all of which negatives any instructions from Rennekamp directly or indirectly to show an incorrect record. It is obvious that if the incorrect records connived at between the manager and the employee were being so prepared at the instructions of Rennekamp, there would have been no reason whatever for concealment. That plaintiff's own witnesses testified to the concealment directly contradicts the Eighth Finding of Fact.

The Sixth and Seventh Conclusions of Law deal with the same matter. The Court states therein that the defendant cannot escape the duty of keeping records by delegating it to others and refers to a "personal non-delegable duty * * * to inquire into the conditions prevailing in his business and he is not relieved of this duty because the extent of his business may preclude his personal supervision and compel reliance on subordinates."

The Sixth Conclusion of Law also contains the statement that "the scheduled hours shown on time sheets signed and submitted by employees to defendant's office in Pittsburgh cannot be considered adequate and accurate records where the employer knew or should have known that they did not reflect the actual hours worked." It has already been demonstrated, from the above quoted testimony of plaintiff's witness, Dolnack, that the defendant, as the employer, did not know that the records did not reflect the actual hours worked because, admittedly, Doelicke, Dolnack, and the other employees made a determined effort, by the time records which they were submitting, to conceal irregularities from Rennekamp (Appendix, 18a).

Plaintiff succeeded in selling the trial Court upon the idea that a perfectly normal and proper desire on the part of Rennekamp to put the operation of Station W E M R on a profitable basis (never reached) by keeping expenses down, was intended as a violation of the Fair Labor Standards Act. Much also was made by the plaintiff of the fact that Rennekamp did not personally participate on a day to day basis in on-the-scene operation of Station W E M R, a requirement which, if it had been in effect in this country in earlier years, would have prevented the economic growth and development of the country and left us in the days of the horse and buggy and the small owner operated businesses.

The erroneous nature of the conclusion of the Court on this phase of the case is further demonstrated by the uncontradicted evidence given by Rennekamp in the form of a letter which he sent to his manager, Doelicke, under date of October 12, 1954 within the first few months of Doelicke's employment. This letter is in evidence at pages 215 to 216 of the Transcript and, after explaining the manner in which time records should be filled out by the employees and the necessity for accuracy, he states "We must have correct time records even if we are required to operate the station less hours per day * * *" (Appendix, 22a). That letter constitutes definite instruction from Rennekamp authorizing the curtailment of hours of operation if necessary in order to comply with the legal requirements as well as to keep the expenses down. The necessity for keeping the expenses down is emphasized by his testimony at page 217 of the Transcript indicating that the average income of the station was $450.00 per month as against an average monthly payroll of $700.00 per month.

The reference in the Sixth Conclusion of Law that the employer cannot escape the duty of keeping records by delegating it to others, if literally interpreted, is unreal. Few employers and no corporation can maintain records without delegating that duty to an agent. Where an employer relies on the individual employee to keep his own time and submit the same in writing to the employer, the result would normally be that the employee in his own self-interest would submit records upon which he would expect to be compensated in a proper manner; certainly that would be the case in the absence of any coercion on the part of the employer and there is not a scintilla of evidence of any coercion exercised by Rennekamp.

Referring now to the Regulations of the Wage & Hour Administrator regarding the keeping of records, we would quote from the official copy thereof as follows: "Section 516.1 Form of records. (a) *No particular order or form of records is prescribed by these regulations.* However, every employer who is subject to any of the provisions of the Fair Labor Standards Act of 1938, as amended (hereinafter referred to as "the Act"), is required to maintain records containing the information and data required by the specific sections hereof" (italics added).

In the absence of any requirement of any particular type or form of record to be kept by an employer, there is no basis for any contention on the part of the plaintiff or the Court below that, as long as the required data is kept, the fact that it was kept or prepared by the employee himself, for whose benefit the Act can properly be assumed to have been intended, constitutes a violation of the record keeping provisions of the Act and Regulation. It follows that the first part of the Seventh Conclusion of Law that the de-

fendant failed to maintain the records of daily and weekly hours actually worked by the employees, is erroneous.

This is not an attempt to justify the keeping of inaccurate records, but we have here the situation where the evidence to support an allegation of inaccuracy in the records comes from employees who, without coercion of any sort, prepared and submitted the records to the defendant and were paid by the defendant on the basis of those records; and any inaccuracies are clearly due not to any instructions or desire on the part of the defendant, but to a conspiracy of concealment between the manager and the employees in question, upon whose testimony the plaintiff's case is based.

4. In view of the circumstances, the action was moot and there was no substantial need for an injunction.

Testifying as plaintiff's witness, James Agnello testified, on direct examination (Transcript, pages 87 and 96), that from February 1956 to the end of his service in October 1956 (when the station was dismantled), he was paid overtime for all hours worked in excess of forty per week (Appendix, 18a) and this was not disputed or questioned by plaintiff's counsel.

The record will show that the present action was filed June 22, 1956. The station was closed down and dismantled on October 20, 1956 as recognized in the Ninth Finding of Fact. The action was tried January 16, 17, and 18, 1957 and the trial judge made his ruling immediately after the testimony closed on January 18th, 1957. On plaintiff's own case there were no violations for practically a year preceding the Court's ruling; and three months before that the station had admittedly been dismantled and the license surrendered to the Federal Communications Commission.

On page 199 of the Transcript, the Court asked Rennekamp whether he still owned the land on which the station had been located. Rennekamp explained that the land had been owned by his wife and that she was even then in the process of selling the land to a neighbor. The Court uses the ownership of Rennekamp's wife, ignoring the sale pending, as part of the basis, in the Tenth Finding of Fact, for granting an injunction.

Nor is that all that is wrong with the Tenth Finding of Fact. Towards the end of the trial, counsel for the plaintiff sought to bolster his weak case by introducing the fact that Rennekamp was a stockholder and officer in a corporation which owned and operated a radio station at Oil City, Pa., W K R Z Incorporated, and was a part owner, albeit a silent one, in a small radio station at St. Mary's, Pa., Station W K B I, for the purpose of justifying an injunction in the present proceeding. As an officer of W K R Z Inc. Rennekamp had in Sept. 1954 signed a consent decree terminationg an action filed a year or more before that by the Secretary of Labor, based upon alleged violations under the Wages and Hours Act in connection with Station W K R Z. That decree, in accordance with the form prescribed by the Court rules, bound the corporation, its officers, agents etc.

At page 200 of the Transcript, on cross examination, Rennekamp was asked by plaintiff's counsel as to his ownership in W K B I and W K R Z Inc. On re-direct, defendant's counsel brought out that Rennekamp was a part owner in W K B I but had no part or control in its management; and defendant further sought to establish by stipulation with plaintiff's counsel, that plaintiff had recognized defendant's lack of responsibility for the operation of

WKBI by discontinuing, as to Rennekamp, an action brought against Rennekamp and Cary Simpson, as owners, alleging violations or irregularities under the Wages and Hours Act. Plaintiff's counsel refused, at first, to so stipulate, saying "I don't think it's relevant to the case" (page 202). The Court then stated: "It doesn't make any difference, it will have no bearing on the outcome of the case" and plaintiff's counsel repeated the same sentiment (bottom page 202 to top page 203, Transcript). Yet, contrary to these expressions by the Court and counsel for plaintiff, the Court in its Tenth Finding of Fact takes into account defendant's part ownership in WKBI as apparent basis for the injunction granted. At pages 236-238 of the Transcript, plaintiff's counsel again asks about WKBI, but at pages 241-242, he finally admitted that Rennekamp had no responsibility for WKBI, and that a prior action by plaintiff had been discontinued as to Rennekamp for that reason (Appendix, 20a-21a).

Exactly the same thing then occurred with reference to Rennekamp's signature as President of WKRZ Inc., in 1954, to the consent decree mentioned above. Again, the Court at page 203 of the Transcript says: "In the Court's mind neither one have any bearing on the case, neither one of them. Perhaps to make a complete record I will admit this one but it can't have any bearing on the case." Yet, in granting an injunction from the bench immediately after the testimony was concluded, in the course of an argument by defendant's counsel, the Court indicated that these matters were taken into consideration, saying, in justifying the injunction, "* * * This man is, of course, still in the radio business, broadcasting business * * *" (Transcript, bottom page 254), and, again, makes a finding in relation thereto, in the Tenth Finding of Fact.

Mr. Rennekamp's ownership of a half interest in W K B I without any participation or control should hav no bearing whatever in this proceeding, because this same plaintiff, the Secretary of Labor, absolved Rennekamp from any responsibility when, admittedly, it discontinued an action similar to this one as to Rennekamp because he had no part in its operation (Transcript, page 242, Appendix, 20a-21a). On the other hand, if his ownership interest in W K B I is considered in this case, Rennekamp is, in effect, being sued in this action, in part, upon the same cause of action which had previously been discontinued against him, and without an opportunity to prepare a defense.

The matter of the consent decree against W K R Z Inc. should have no place in this proceeding for the obvious reason that legally the defendants in the two proceedings are not the same. Even if we pass that technical reason, the fact that the consent decree against W K R Z Inc. bound the officers, agents, employees, etc. of that corporation, of which officers Rennekamp was one, argues that if Rennekamp was already under one injunction, there was no need whatsoever for another injunction against him in this proceeding, requiring the same things of him.

In American jurisprudence, an injunction has always been considered an extraordinary remedy, not to be hastily or lightly invoked. The granting of an injunction is not mandatory, but discretionary: Hecht Company v. Bowles, 321 U. S. 321 (1944), an action involving the Emergency Price Control Act.

The injunction is not to be used to punish past offenses, but only in a proper case to prevent wrongdoing in the future: Walling v. Gulf States Paper Corp. (C.

C. A.—5) 143 F. 2d 301, affirming 53 F. Supp. 619; Walling v. Panther Creek Mines Inc. (C. C. A.—7) 148 F. 2nd 604; Walling v. Halliburton Oil Wells Company (D. C. Cal.) 57 F. Supp. 408, affirmed 152 F. 2nd 622, affirmed 331 U. S. 17, 91 L. Ed. 1313, 67 S. Ct. 1056; Walling v. Associated Truck Lines Inc. (D. C.—Mich.) 57 F. Supp. 943.

The evidence offered by the plaintiff together with the admitted facts indicate that the following circumstances are present in this case:

(a) Defendant had ceased any alleged violations months before the commencement of this action.

(b) Station W E M R was dismantled in October 1956.

(c) Defendant subsequently surrendered his license for Station W E M R to the Federal Communications Commission and the Federal Communications Commission cancelled that license.

(d) Property on which the station had existed was in the process of being sold by defendant's wife at the time the action was being tried by the lower Court.

(e) To the extent that any possible basis or justification for an injunction exists, the defendant is already covered under the terms of the consent decree and the injunction entered in the matter involving Station W K R Z Inc.

Upon the basis of the foregoing circumstances, it is respectfully submitted that no need for an injunction has been established by the plaintiff in this proceeding and that, in view of the fact that the business involved in this proceeding is plainly out of existence, the action is moot.

Conclusion.

For the reasons hereinabove set forth at length, defendant respectfully submits to the Court that the judgment of the lower Court is in error and should be reversed and rendered for the defendant for the following reasons:

1. The Fair Labor Standards Act was not applicable to the employees of Station W E M R operated by the defendant.

2. The action of the lower Court in applying the Act and in granting an injunction violates the rights of the defendant under the Fifth Amendment to the Constitution of the United States.

3. The Findings of Fact and Conclusions of Law entered by the Court below are not sustained by credible evidence.

4. Under the circumstances here present, the need for an injunction was not established by the plaintiff and the action is moot.

Respectfully submitted,

DAVID R. LEVIN,
KENNETH E. RENNEKAMP,
Attorneys for Appellant.

APPENDIX.

Docket Entries.

1956

June 22 Complaint filed.

June 22 Summons issued.

June 27 Summons returned served.

July 14 Praecipe for appearance for counsel for defts. filed.

July 14 Notice of Motion and Motion for Bill of Particulars filed by the defendant.

Aug. 5 Hearing on Motion for Bill of Particulars begun before Gourley, J.

Aug. 5 Hearing concluded C. A. V.

Aug. 5 Hearing memo filed. (Order to be entered.)

Sept. 17 Order of Court entered directing Answer to be filed within 20 days from the date of this Order; the within proceeding is set for trial during the Non-Jury term of Court to commence November 12, 1956.

Oct. 6 Answer to Complaint filed by defendant.

Oct. 29 Notice to take Oral Depositions filed by Plaintiff.

Oct. 30 Motion *ex-parte* defendant to vacate plaintiff's Notice for Oral Depositions filed.

Nov. 1 Hearing on Petition for Restraining taking of Depositions by plaintiff, before Gourley, J.

Nov. 1 Hearing concluded. Hearing memo filed. (Court Reporter Helen Smith.)

Nov. 1 Petition filed and Order of Court entered directing Defendant's Motion *ex-parte* of October 30 and plaintiff's Notice of October 29, for Taking Oral Depositions; are hereby restrained, Parties to agree on a satisfactory date within ten (10) days from the date of this Order, failure to agree

1956	
	on Application of either Party the Court will set a date for the Taking of Deposition; Proceeding is fixed for trial during week of January 7, 1957. (Gourley, J.)
Dec. 26	Depositions of John H. Garlich and Robert Curt Doelicke, together with certain Exhibits, filed by plaintiff.
1957	
Jan. 16	Order of Court entered transferring Case from Non-Jury trial list of Gourley, J. to Judge Willson for trial and disposition.
Jan. 16	Non-Jury Trial opens before Willson, J.
Jan. 17	Trial continues.
Jan. 18	Trial continues.
Jan. 18	Trial concluded. Trial memo filed. (Findings of Fact and Conclusions of Law to be filed.)
Jan. 25	Findings of Fact and Conclusions of Law filed by Willson, J.
Jan. 25	Order entered permanently enjoining and restraining defendant, his agents, etc. from violating the Fair Labor Standards Act. (Willson, J.)
Jan. 25	Pursuant to Order entered, defendant, his agents, etc. are hereby permanently enjoined and restrained from violating the Fair Labor Standards Act.

JAMES H. WALLACE, JR.,
Clerk.

Feb. 4	Motion for New Trial filed by the defendant.
Mar. 11	Hearing on Motion for New Trial begun before Willson, J.

1957

Mar. 11 Hearing concluded. C. A. V.

Mar. 11 Hearing memo filed. (Rep. Helen Smith.)

Mar. 12 Memorandum decision on Motion for New Trial filed. The Motion of defendant Kenneth E. Rennekamp for a New Trial is denied. Wilson, J.

Mar. 14 Notice of Appeal filed by the attorney for the defendant.

Mar. 14 Bond for cost on Appeal in the amount of $250.00 filed.

Mar. 14 Copies mailed U. S. Clerk of Appeals; counsel for pltf. and letters to counsel and J. Willson.

Apr. 12 Transcript of Non-jury trial held Pgh. Jan. 16, 17, 18, 1957 before Willson, J., filed. (Erme M. Pock Reporter.)

June 6 Record on appeal mailed to Clerk, U. S. Court of Appeals and letters sent to counsel and Judge Willson.

Memorandum Decision on Motion for a New Trial.

(Filed March 12, 1957.)

This case was tried to the court, and at the conclusion of the trial, while on the bench, an oral decision was announced, granting plaintiff the relief as prayed for and directing plaintiff's counsel to submit proposed findings of fact and conclusions of law. These were submitted, and on January 25, 1957 the court adopted the findings and conclusions and directed they be filed. Defendant Kenneth E. Rennekamp has moved for a new trial. The parties have been heard at argument.

Defendant contends that plaintiff failed to produce sufficient evidence on which to base a finding that his employees were engaged in interstate commerce within the meaning of the Fair Labor Standards Act of 1938, 29 U. S. C. A. 201, *et seq.* The fourth and fifth findings of fact are the basis for the second and third conclusions of law. The case of *Lorain Journal Co. v. United States*, 342 U. S. 143, is authority for rejecting this contention by defendant. The court says, page 151:

> "There can be little doubt today that the immediate dissemination of news gathered from throughout the nation or the world by agencies specially organized for that purpose is a part of interstate commerce * * *"

Defendant's radio station WEMR had in its office an Associated Press teletype machine, which was in operation on a twenty four hour basis. World-wide news, which had been gathered by the Associated Press, was thus brought to the station and broadcast by the announcers in the Emporium area. In addition, from time to time broadcasts of baseball games which originated from out of Pennsylvania were transmitted over defendant's radio station to the local listeners in the Emporium area. It is thus apparent that defendant's employees came under the provisions of the Fair Labor Standards Act.

Defendant's main contention is, however, that the findings and conclusions are against the weight of the credible evidence. Defendant urges that he gave explicit instructions, prepared and directed the use of time cards, all with the intent and purpose that his employees at his radio station were to work only a limited number of hours. Defendant contends that if his employees, who are the witnesses relied upon by the government, did put in hours

over and beyond the work week as authorized by him, they did so without his knowledge and consent and contrary to his instructions. However, it should be recalled that defendant is a member of the bar, residing and practicing in Pittsburgh. The radio station involved was located at Emporium, in this district, approximately 150 miles from Pittsburgh. Defendant, under the evidence, but seldom visited the station. He directed the operation of it largely by telephone. It is apparent that one of the requirements to his manager and to his other employees was that the station must pay its own way. In order to pay its own way, the employees were required to sell advertising, write the script for the advertising, do the announcing on the air, prepare the bills and collect for the advertising and deposit the money in the bank at Emporium. The employees were either on a forty-five and one-half hour or forty-eight hour week. If, in sending their time cards to Pittsburgh, hours in excess of those authorized were shown, the employee simply did not get a check. From the testimony it was established that the employees did, in fact, work in excess of the time shown on the time cards or sheets, for which time they received no pay. The defendant's testimony and his other evidence simply did not overcome the credible testimony offered by the employees on behalf of the government.

Defendant contends also that the remedy sought, that is, the injunction, is too harsh and should not be imposed in this instance. The court cannot agree with this contention. It is believed that, under all of the evidence, the relief prayed for is justified. THEREFORE IT IS ORDERED

This 12th day of March, 1957, the motion of defendant Kenneth E. Rennekamp for a new trial is denied.

s JOSEPH P. WILLSON

Order.

(Filed January 25, 1957.)

And Now, this 25th day of January 1957, the above case having been heard on pleadings and proof in open Court and after argument of counsel, and it appearing that plaintiff is entitled to an injunction as prayed for, it is hereby

ORDERED, ADJUDGED, AND DECREED that defendant, his agents, servants, employees, attorneys, and all persons acting or claiming to act in his behalf and interest be, and they hereby are, permanently enjoined and restrained from violating the provisions of Sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Amendments of 1949, as amended (Act of October 26, 1949, c. 736, 63 Stat. 910, as amended August 12, 1955, 69 Stat. 711, U. S. C. Title 29, Sec. 201, *et seq.*), hereinafter referred to as the Act, in any of the following manners:

(1) The defendant shall not, contrary to Section 6 of the Act, employ any of his employees engaged in commerce or in the production of goods for commerce, as defined by the Act, at wage rates less than One Dollar ($1.00) an hour or any wages at a rate less than that which may hereafter be established as the applicable minimum by any amendments of the Act.

(2) The defendant shall not, contrary to Section 7 of the Act, employ any of his employees engaged in commerce or in the production of goods for commerce, as defined by the Act, for a workweek longer than 40 hours, unless the employee receives compensation for his employment in excess of 40 hours at a rate not less than one and one-half times the regular rate at which he is employed.

(3) The defendant shall not fail to make, keep, and preserve records of his employees, and of the wages, hours, and other conditions and practices of employment maintained by him, as prescribed by the regulations of the Administrator of the Wage and Hour Division, United States Department of Labor, issued and from time to time amended, pursuant to Section 11(c) of the Act, and found in Title 29, Chapter V, Code of Federal Regulations, Part 516.

By the Court:

JOSEPH P. WILLSON,
United States District Judge.

Excerpts From Testimony.

From deposition of Robert Curt Doelicke:

Direct Examination:

At page 19.

"A. • • • and it was also said to me the other employees should sell, too—they'll receive their 15 per cent, but they never did sell any.

Q. Did you actually put in any time selling?

A. Oh, I had to. It's the only way I could—

Q. How many hours a day would you put in?

A. Well, I never kept track of how many hours.

Q. To your best recollection?

A. I would spend a whole afternoon downtown.

• • •

Q. How many days a week would you put into your selling effort?

A. The business days, five days."

Cross Examination:

Bottom page 72 to middle page 73.

"A. • • • In the afternoon I would spend at least three or four hours downtown with clients.

Q. You say you were doing what downtown?

A. Speaking—you know, visiting the business people and trying to sign them up—appointments, and so on.

• • •

A. (Continued to basic question.) Yes. Now we had no transportation to get to and from the station. The station was way out away from the town and there was that time-consumed effort, too, to get out there and get back all the time."

Doelicke's deposition, cross examination, Page 76:

"Q. You want us then to understand that every day in the week from the time you were employed at WEMR until the time you left you spent every afternoon downtown about three hours in the afternoon selling advertising on WEMR, is that right?

A. "Selling" is a big term. I was meeting the business people downtown.

Q. Every afternoon?

A. I was down there every afternoon, yes."

Direct Examination:

Page 23 of depositions.

"Q. Did your compensation of $130.00 every two weeks ever vary during the period of your employment? Did you ever receive more than $130.00? Let me put it that way.

A. There may have been one spot when I first started to work in E. M. R. where I may have got

$10.00 extra—I vaguely recall something there—but there was only that one instance* * *"

* * *

At page 60.

"Q. One man at a particular hour could operate that station?

A. Yes."

* * *

Doelicke's deposition, cross examination, page 42.

"Q. Have you any record whatever of the hours you actually worked for WEMR between April 1954 worksheet that was mailed to Mr. Rennekamp.

and the time you ceased working for that station?

A. Only the records I made out on the 2 week worksheet that was mailed to Mr. Rennekamp.

* * *

Q. Well, aside from the worksheets that you sent in to Mr. Rennekamp and the program logs that you have referred to, have you any other records—

A. No, sir.

Q. —of the hours that you worked between April '54 and the end of your work for WEMR?

A. No, sir."

Doelicke's deposition, cross examination, pages 109-110.

"Q. You never made any demand on Rennekamp for additional payment?

A. No."

From testimony of Albert P. Burton:

Direct Examination:

Transcript.

Page 18.

"Q. In what connection did you work hours in excess of 45?

A. Well, remote broadcast for one thing.

Q. Remote broadcasts. Will you please explain to the Court just what a remote broadcast means?

A. Well, broadcasts originating at a point other than the studio and/or studio transmitter site."

Transcript.

Page 21.

"Q. Were there any request shows in which you participated?

A. There was a request show in which I participated. It started at nine o'clock in the evenings and ran until ten and then due to the volume of requests we eventually ran it all the way up until the eleven o'clock news.

Q. How frequently did you participate in these request shows?

A. Three nights a week, as I recall it was every other night of my work week.

• • •

Q. Was that in addition to your regular work day that was scheduled?

A. Yes.

• • •

Pages 21 to 22.

Q. And when did these request shows start in relation to your commencement of employment with the defendant company?

• • •

A. In December.

Q. In December of 1954?

A. Yes.

Q. How long did these request shows run?

• • •

A. Three months, four months perhaps.

• • •

Q. Were you paid any *extra overtime for such* hours of work?

A. No.

Q. Were these hours of work shown on any time sheets that were submittted to Mr. Rennekamp?

A. They were not."

Cross Examination of Albert P. Burton:

Transcript.

Page 28.

"Q. But aside from the request shows or during the period prior to those request shows that station is a one man operation, isn't it?

• • •

A. In a strictly routine sense, yes, • • •"

Transcript.

Bottom page 29 to top of page 30.

"Q. Now you have testified about the services of Mr. Doelnicke. (Counsel's note: this should be spell-

ed Doelicke as distinguished from another witness, Dolnack.) Did you ever accompany him on any of his duties?

A. Yes, I did, quite a lot.

Q. Where to?

A. To the various accounts which he was trying to sell radio time to.

Q. What would be the reason for your accompanying him, if any?

A. To, well, I drove him to his calls.

• • •

Q. How many times would you say you accompanied Doelnicke (Doelicke)?

• • •

A. When I first started and for the first possibly three months that I worked almost continuously."

Pages 31-32.

"Q. When you were first employed by Doelnicke (Doelicke) you say that you were given to understand that you were to drive him around, is that right?

A. That's right.

• • •

Q. How much were you to get for the services of driving him around, in compensation?

A. My regular pay.

Q. You mean your standard pay as an engineer-announcer?

A. That's right."

• • •

Transcript.

Page 34.

"Q. Did you at any time have any dealings with Mr. Rennekamp personally?

A. No."

• • •

Transcript.

Pages 36-37.

(After identifying Exhibit No. 1 as 15 pages of Time Sheets made out by him and on which he received payment.)

"Q. You stated that you were doing these record shows between nine and eleven. I think nine to ten?

A. Nine to ten and then nine to eleven.

• • •

Q. If the record shows took place during that month, during the hours from nine to eleven and if you were paid during December from 5:15 to 11:15, you were paid for your record shows in December, were you not?

A. Yes.

• • •

Q. I show you the following sheet which covers the period from December 31, 1954 to January 13, 1955 and isn't it true that you reported time from 5:15 to 11:15 during that period and were paid for those hours?

A. That's right.

Q. Isn't the same thing true from January 14, 1955 down to February the 19th, 1955?

A. Yes.

• • •

Q. And you were paid for that period?

A. That's right."

• • •

Page 40.

"Q. Did you ever make any complaint to Rennekamp about it? (Referring to driving Doelicke about.)

A. No."

• • •

"Q. I show you on the back of each of these time sheets, which I assume you have read?

A. Yes.

Q. This statement, 'Employee is authorized to work only those hours shown on time sheet and any changes in work schedule must be approved in writing by station manager.' Did you ever receive from Doelnicke (Doelicke) any written approval for any overtime hours or anything like that?

A. Everything was verbal."

• • •

Transcript.

Page 41.

"Q. And you never made any demand on Mr. Rennekamp who signed your checks, is that right?

A. That's right.

Mr. Levin: We offer in evidence Defendant's Exhibit 1.

The Court: Any objection.

Mr. Weiner: No objection.

The Court: All right, they are admitted."

• • •

Re-direct Examination of Burton:

Transcript.

Pages 43-44.

"Q. Now, did you during any time of the work week, January 6th, 1955, come into work before twelve noon, any of those work days?

A. Almost always because I would pick Mr. Doelnicke (Doelicke) up with my automobile before or no later than nine o'clock.

Q. When would you report then to the broadcasting station?

A. We would drive to the station and he would perform any duties that he had to perform there, thirty, sixty minutes, and then he would go out and make some calls."

• • •

Re-cross Examination of Burton:

Transcript.

Pages 45-46.

"Q. What would you then do if you came in at nine o'clock?

A. I brought Doelnicke (Doelicke) to the station and then took him from the station on his round of calls.

• • •

Q. Did you accompany him after you took him to town? Did you stay with him on every call he made?

A. Yes."

• • •

Page 48.

"Q. Not only did you take him back and forth, you say you took him back to town to sell and you waited while he sold?

A. That's right.

Q. And took him from customer to customer?

A. Absolutely.

By the Court:

Q. Did you go inside with him and help put on the sales talk?

A. Yes, I went inside to meet the people that he called upon."

• • •

From testimony of George E. Dolnack, Jr.

Transcript.

Pages 51-52:

Mr. Levin: Just one moment, if the Court please. At this point we note an objection to testimony of the witness on the grounds that when Mr. Weiner disclosed to us before Judge Gourley the names of the employees as to whom violations were claimed, the names that he gave us and the dates did not include this witness.

• • •

Mr. Weiner: He was in Florida.

A. No, sir, Syracuse.

Mr. Weiner: Our understanding was that you were in Florida at that time. We subsequently learned he was in Syracuse. On that basis, we asked him to come to testify. We didn't know he would be available as a witness.

The Court: It must be routine. As a matter of fact, I don't see, Mr. Levin, how it's any great surprise that this man would testify when the other man testified.

Mr. Levin: We don't know whether he was going to testify or not. We don't know whether we have his records. We prepared for five. We don't know about him. That's the problem.

The Court: We will see. We will permit you to go ahead.

Mr. Levin: Your Honor will note our objection."

• • •

Cross Examination:

Transcript.

Page 57.

"Q. I think you said before when I interrupted, unintentionally, that the one occasion after the station went back on the air, you submitted on your time sheet overtime, is that correct?

A. That's correct.

Q. And you were paid when you submitted it?

A. That's correct."

• • •

Transcript.

Page 60.

"Q. You were paid by Mr. Rennekamp on the basis of these time records?

A. Yes, I was.

• • •

Q. These are not in order, Mr. Dolnack, but I am going to see if you can't refer to this. On top is one showing time from February 22, 1955 to February 26, 1955. That particular occasion shows you worked from 6:30 P. M. to 11:15, right?

A. It shows on the time record I worked those hours but actually I didn't work those hours. I was told by Mr. Doelnicke (Doelicke) to put this record of time on the time sheet in order to show Mr. Rennekamp that none of the employees' time at the radio station would overlap and maybe Mr. Rennekamp would question the reason why two or more men would be on duty at the radio station during that time.

Q. So Mr. Doelnicke (Doelicke) then instructed you to make out the record this way, so Mr. Rennekamp wouldn't know there was overlapping going on, is that correct?

A. That's correct."

• • •

James Agnello—plaintiffs' witness.

Direct Examination:

Transcript.

P. 87.

"Q. • • • We understand perfectly from the period after February of what year was it after February?

A. '56.

Q. 56.

A. I was paid overtime.

• • •

Q. For the hours you worked over forty?

A. Yes, sir."

Objection to testimony of Betty Lesco.

Transcript.

Page 102.

Mr. Levin: Just a moment. May I interject at this time an objection to the testimony of this witness for the reason that she is not included among those whose names were furnished by counsel for the plaintiff to us in Judge Gourley's courtroom as being employees whose hours were worked in excess of the maximum and who were not paid, that we are surprised by any testimony from this witness at this time in this proceeding.

The Court: Well, she has been an employee of this company, as I understand it so I am going to hear it. Objection overruled. Go ahead.

Mr. Levin: Will your Honor note us an exception?"

* * *

From testimony of Norman W. Suiter, witness for Plaintiff.

Direct Examination:

Page 128.

"A. * * * There is one exception for the week ending September 24, there is a notation of six hours having been paid, evidently a football game at six hours at $1.875 or a total of $11.25 * * *"

* * *

DISCUSSION.

Transcript.

Page 220.

Discussion between counsel and the Court.

"Mr. Levin: It will show this is a small station with a radius of 10 miles officially in either direction.

The Court: I don't see any dispute about that • • •"

• • •

Testimony of Kenneth E. Rennekamp.

Transcript.

Page 200.

"By the Court:

Q. Did you say you have an interest in WKBI in St. Mary's?

A. I have 50% per cent.

Q. Also in Oil City?

A. I am a stockholder in Oil City Corporation, yes, sir.

• • •

Pages 202-203.

Mr. Levin:

"Q. Just a minute. You take no active part in St. Mary's at all?

A. I am what is known as a silent partner.

Mr. Levin: I'd like the record to show—

Mr. Weiner: The record so states, he testified to that effect.

Mr. Levin: —that an action involving the St. Mary's station was discontinued by your office as to him. Will you so stipulate?

Mr. Weiner: No, I will not stipulate to anything. I don't think it's relevant to the case.

The Court: It doesn't make any difference, it will have no bearing on the outcome of this case."

• • •

Transcript.

Page 242.

"Mr. Weiner: I will state for the record the action was discontinued as to Mr. Rennekamp and for the reason that he was a silent partner and had, as we understood, no active participation in the operation of that station."

• • •

Remarks of the Court.

Transcript.

Page 208.

"The Court: He must look after what's going on up there. If he leaves it to these young fellows and they go out and work extra odd hours, night time, day time, I think he's got to be responsible for it in this case."

• • •

Transcript.

Page 216.

Testimony of Rennekamp.

Excerpt from letter to Doelicke, dated October 12, 1954.

"* * * We must have correct time records even if we are required to operate the station less hours per day * * *"

* * *

Transcript.

Page 222.

From testimony of Kenneth E. Rennekamp.

Direct Examination:

"Q. I show you Defendant's Exhibit No. 7 and ask you if that is a communication from the Federal Communications Commission to you personally?

A. Yes, it is.

Q. Will you read the contents of that communication, date and so forth?

A. It is from the Federal Communications Commission, Washington 25, D. C. December 14, 1956 * * * 'Dear Sir: In accordance with the letter from your Attorney, Vincent A. Pepper, dated November 28, 1956, your license (file No. BL-5311) which authorized a new standard broadcast station at Emporium, Pa. is hereby cancelled as of this date and call letters W. E. M. R. are deleted. Very truly yours, Mary Jane Morris, secretary. Copy to Welch, Mott, and Morgan, Attorneys.' "

* * *

Cross Examination of Rennekamp.

Transcript.

Pages 233-234.

"Q. You devoted seven minutes to WEMR in April and five minutes in May of 1954 on your way to Leominster, Massachusetts and back and you devoted no time during the whole period from October, 1954 to May of 1955. What prevented you from getting down to your station?

A. I was at the station in October of 1954 and the bad weather prevented me from getting to the station—

The Court: That doesn't mean anything. That is no excuse, Mr. Rennekamp. I drove that country three years every week end, 125 miles. If that's the only reason he's got, it's no answer, it's no defense.

• • •

A. There was no occasion to go down to the station as Mr. Doelnicke (Doelicke) was contacting me by phone and by mail.

By Mr. Levin:

Q. How often would you talk to Station WEMR in Emporium by phone on an average per week?

A. From one to three times a week.

Q. Didn't you also have correspondence when the occasion arose?

A. I had on an average of possibly from one to three letters a week."

• • •

Transcript.

Page 250.

From statement by the Court.

"• • • It's like any other civil case. It depends on the preponderance of the evidence and comparison and weight of testimony. That's all there is to it • • • but the weight of the testimony, these men he had up there and his manager particularly just simply put in more time and it seems to me he should have known it and he is bound by it, whether he did or did not know about it • • •"

• • •

Transcript.

Pages 251-252.

"Mr. Levin: I would point out to your Honor in the cross examination of Mr. Dolnack • • • and I think that is the crux of this whole situation, he said that Doelnicke (Doelicke) told him not to show that because he didn't want Rennekamp to find out that they had been working extra hours. I don't know if your Honor noted that statement.

Mr. Weiner: No, there wasn't anything about overtime. There was an overlap.

Mr. Levin: Whatever it was, they didn't want Rennekamp to find out about it.

The Court: I took that to be, they understood Rennekamp said to them, here you have got so many hours a week to work. That's all you report. If you work over that, don't let me know about it, but get advertising in and keep the station on the air.

Mr. Levin: I submit to your Honor that is not a fair assumption.

The Court: That's what the proof indicates to me, hearing all the proof * * *"

* * *

Letter from Defendant's Attorney to Plaintiff's Attorney.

DAVID R. LEVIN
ATTORNEY AT LAW
100 STANDARD LIFE BUILDING
Fourth Avenue and Smithfield Street
Pittsburgh 22, Pa.

Telephone:
GRant 1-1508

September 24, 1956

Louis Weiner, Asst. Regional Attorney
U. S. Department of Labor
809 Lafayette Building
Philadelphia 6, Pa.

Re: Mitchell, Secretary vs. Rennekamp
U. S. Dist. Ct., Western Dist. of Pa.
Civil Action #14758

Dear Mr. Weiner:

When we were before Chief District Judge Gourley on September 5, 1956 in the above matter, in connection with our Motion for the Bill of Particulars, the court suggested that the requested information be furnished by you informally to avoid further technical proceedings and delays

Pursuant to that suggestion, you read off a list of names of defendant's employees in connection with whose employment the violations complained of took place and you listed certain dates for each employee presumably indicating the period of time covered by the alleged violations.

Upon checking the dates furnished by you at that time with our employment records, it now appears that your dates cover the entire period of employment for the respective employees mentioned. This creates uncertainty in our minds as to the exact situation and we find it necessary to request further clarification in order to be in a position to prepare our Answer. Our question is this: In providing us with the data on September 5 were the dates given by you intended to indicate that the alleged violations took place during the entire period of employment of each of the individuals involved or is it the position of your office that certain violations took place on various occasions during that period? In the latter event I would request that you go one step further and give us the dates of specific violations with respect to each of the employees so that we may be able to check our records for those specific dates and be in a position to prepare our defense.

Please advise as to your position regarding the above matter.

Very truly yours,

DAVID R. LEVIN.

DRL/mg

Letter from Plaintiff's Attorney to Defendant's Attorney.

U. S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
809 Lafayette Bldg.
Philadelphia 6, Pa.

October 10, 1956

David R. Levin, Esq.
100 Standard Life Building
Fourth Avenue & Smithfield Street
Pittsburgh 22, Pennsylvania

Re: Mitchell v. Rennekamp
Civil No. 14758

Dear Mr. Levin:

Upon receipt of our Wage-Hour files in the above matter from the Field, I can reply to the question raised in your letter of September 24, 1956, as follows:

In providing you with the data in Judge Gourley's Court in Pittsburgh on September 5, 1956, the dates given to you indicated that the violations alleged in the complaint took place during the entire period of employment of each of the individuals involved.

Very truly yours,

LOUIS WEINER,
LOUIS WEINER,
Assistant Regional Attorney.